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Twenty-fourth session

SUMMARY RECORD OF THE 460th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 24 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 13 (continued)

1. Ms. KOSKELO (Observer for Finland), introducing her Government's proposal (A/CN.9/347, p. 25) to replace the second sentence of article 13(1) by the following words: "However, a receiving bank that has issued a payment order inconsistent with the payment order accepted by it is not entitled to a return of funds from its receiving bank", said that it was connected with her Government's suggestion concerning article 17(1). It should be made clear that the credit transfer was completed when the beneficiary's bank accepted a payment order to the benefit of the beneficiary designated in the originator's payment order. In other words, in the case of an erroneous execution by a bank in the transfer chain whereby the beneficiary who received the funds was not the beneficiary designated by the originator, the situation should be treated as one in which the transfer had not been properly completed and the provisions of article 13 should apply.

2. However, in her delegation's view, the money-back rule set out in article 13 should operate in such a way that the bank which had perpetrated the erroneous execution would be obliged to refund the money to the sender. That bank would not be entitled to any refund other than by way of recovery from the person who had been erroneously given the funds.

3. Mr. GREGORY (United Kingdom) said that the Finnish Government's proposal raised some tricky questions. It was necessary to distinguish between a situation in which the money involved passed through the hands of a person or entity other than a bank and that in which it passed through a bank.

4. If it passed through a bank which was not the beneficiary's bank and was then lost, the risk of the money-back guarantee seemed to rest with the last bank involved before the funds were lost, a bank which might have had no way of knowing that it was not the bank designated in the originator's payment order. In such a situation, it might be that some shift of the risk would be appropriate. On the other hand, he did not think that the Finnish proposal was the solution, because it prevented the bank which had made the mistake from ever obtaining a refund. That was clearly inappropriate because, if the next bank in the chain was able to refund the money, it should do so.

5. The Commission would appear to be introducing a further element of fault-based liability that was not covered by article 16, which applied only when the transfer had been completed. In that connection, it should not be forgotten that article 13 applied in cases where the transfer had not been completed.

6. Another situation that should be considered was one in which the funds, having reached the beneficiary's bank, were credited to the wrong account. That raised a very difficult question since, according to the Law, the acceptance of the order by the beneficiary's bank completed the transfer.

7. Mr. SCHNEIDER (Germany) said that there were a number of cases which were not covered by article 13. One such case was that of a payment order which was passed to a bank which refused to accept it. Another situation, where there was no money-back guarantee, was that of an originator who was seeking to recover his funds from a second or third intermediary bank.

8. Mr. ABASCAL ZAMORA (Mexico) said that the concern expressed by the Finnish delegation might be met by inserting a provision similar to that embodied in article 11(7) where, if the credit transfer had been completed but a receiving bank had executed a revoked payment order, the receiving bank had the right to recover from the beneficiary the amount of the credit transfer.

9. Mr. BURMAN (United States of America) said that the Model Law, which was a delicately balanced proposal where each article depended on the operation of others, worked under the general concept of the money-back guarantee. Consequently, where a transaction had not been completed, the funds were returned to the originator who then had an opportunity to initiate the transaction once again. The Commission could not possibly provide for every conceivable situation and he thought that it would be preferable to retain the original text.

10. In reply to a question by Mr. GREGORY (United Kingdom), Ms. KOSKELO (Observer for Finland) said that the purpose of her Government's proposal was to determine which party within the credit transfer chain would have to bear the burden of recovering funds from the wrong beneficiary. According to the existing text, the bank that committed the erroneous execution would itself be entitled to a refund from its receiving bank and the burden would thus be borne by a bank which, under article 7(2), was innocent.

11. Mr. BURMAN (United States of America) informed the Commission that, with regard to netting schemes, his delegation and that of the United Kingdom were seeking to achieve an acceptable text, as the Chairman had asked them to do. It was still his delegation's conviction, however, that multilateral and some bilateral netting systems would be unable to work with a "skip" rule.

12. Mr. GREGORY (United Kingdom), having confirmed that his delegation and that of the United States were still trying to reach an accommodation on a "skip" rule text, said that the same argument applied to the refund under article 13 as to revocation under article 11 and there was no reason to use different language.

13. The CHAIRMAN said that there were similarities between the attitudes of members of the Commission to article 13 and article 11, as far as the United Kingdom proposal for the so-called "skip rule" was concerned. Having taken an indicative show of hands, he noted that, subject to any modification needed with regard to netting, the United Kingdom proposal was strongly supported.

14. Mr. SCHNEIDER (Germany) said there might be other ways of dealing with the problem which would arise in the absence of a skip rule, whereby the originator might have no means of getting his money back. He proposed the insertion in article 13(1) of the words: "If a credit transfer cannot be

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completed, the originator is entitled to the return of any funds which the intermediary bank has received and not paid in executing the payment order." That would deal with the problem of a lack of money-back guarantee where there were special circumstances.

15. Mr. VASSEUR (Banking Federation of the European Community) said that his Federation was concerned about a situation which, though rare, was not unimportant, namely, the case when a non-recoverable loss of funds occurred without the originator, his bank, the intermediary bank or the beneficiary's bank making any mistake whatsoever. Compensation would be available through SWIFT, to a limited extent only, but the originator's bank would remain obligated to the originator for a complete reimbursement of the funds. If the answer to his question lay in article 13, it was not apparent to him.

16. The CHAIRMAN said that, in a sense, the banks would surely be obligated.

17. Mr. VASSEUR (Banking Federation of the European Community) said that the originator's bank would be unable to recover the funds, owing to the limitation of liability, and would therefore be the loser. He suggested that the situation might be brought closer to that covered by the second sentence of article 13(2), the case in which the originator's bank had chosen the intermediary bank. A transfer order which was intended to go through the SWIFT network, with the originator's bank's knowledge, would carry some right to repayment.

18. The CHAIRMAN thought that that solution would be too favourable to the originator's bank. Unless there were very strong feelings among the members of the Commission in favour of the insertion of some such provision in the Model Law, he did not think it would be advisable, but a reference to the problem might be included in the Commission's report.

19. Mr. ABASCAL ZAMORA (Mexico) said that he was not altogether happy at the prospect of interpretations of the Law being consigned to a commentary, despite the undoubted usefulness of the Secretariat's comments (A/CN.9/346, pp. 74-75, paras. 19-22). There were many excellent reasons why the inclusion of a clause covering certain cases of exception in the text of the Model Law itself should be considered.

20. The CHAIRMAN noted, after a show of hands, that there was a substantial majority in favour of including a clause covering certain cases of exception. He took it, therefore, that the Commission approved, in principle, the inclusion of such a clause.

21. It was so decided.

22. Mr. GREGORY (United Kingdom) said, in connection with the point made by the representative for Germany and the wording he had suggested to give an originator a direct right of action, that the text for article 11 which his

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own delegation was discussing with the delegation of the United States did not appear to overlap with the German proposal. Success in the discussions therefore would not weaken the case for tackling that problem.

23. To his way of thinking, the money-back guarantee had always been regarded as additional to the ordinary rights of the originator to get his money back. It was not a substitute for any restitutionary remedies which the originator might have, should he wish to go to the country concerned and pursue the bank involved. The money-back guarantee had been intended as an easier remedy, rather than an alternative one.

24. The sticking point was once again article 16(8), which purported not only to cover the remedies contained in that article for breach of provision but also to exclude all other remedies. It was important that, when the Commission came to consider that provision, it should not exclude ordinary restitutionary remedies, such as an originator might have against a bank in any particular country should he wish to go there in their pursuit.

25. While the Commission should be wary of giving any general right to the originator without considering very carefully what its nature would be, it was unclear whether the law of any particular country would confer on the originator anything more than a claim in damages. He might not be able to identify his money. He might only have a claim against the bank concerned. The matter required very careful thought.

26. Mr. FELSENFELD (United States of America) said he could not agree that the money-back guarantee was an addition to the rights otherwise existing under the law. To his mind, a right as fundamental to the working of the Model Law as the money-back guarantee was an independent right, separate from other rights, designed to be exercised on its own terms with all the benefits and supports and qualifications that the Model Law conferred. He agreed that article 16 might provide the opportunity to discuss the matter, which his delegation had not intended to raise. Once it had been raised, however, it ought to be settled.

Article 14

27. The CHAIRMAN said that the Government of Canada had proposed a drafting change to the article (A/CN.9/347, p. 12). If he heard no objection, he would take it that the Commission wished to submit that proposal to the Drafting Group.

28. It was so decided.

29. The CHAIRMAN said that the observer for Finland had suggested the insertion of a reference to the provision concerning charges (article 17(3)) so as to ensure its application.

30. The CHAIRMAN said that there was a close connection also between article 14 and article 7(2). Where correction for an underpayment was needed, no additional charge should be incurred. The Netherlands proposal that article 16(5) should be deleted also had a bearing on article 14.

31. Mr. GREGORY (United Kingdom) said it should be made clear that the meaning of article 17(3) was that a credit transfer was not to be regarded as completed if less than the right amount was transferred, except where the difference was due to charges.

32. Mr. FUJISHITA (Japan) said that his Government's proposed amendment of article 14 (A/CN.9/347, p. 38) was prompted by a similar concern regarding the partial completion of a credit transfer. The opening words of the article: If the credit transfer is completed in accordance with article 17(1), ..." were unsatisfactory in that they implied that the credit transfer had been completed and that, even if the final amount accepted by the beneficiary's bank was less than the amount ordered by the originator, the transfer would still be regarded as completed. There seemed to be no way in which article 13 could be brought to bear.

33. The point was a very important one which could lead to a loss of confidence in the original route of credit transfer without the possibility of obtaining refund of the missing part by some other route.

34. Mr. CRAWFORD (Canada) said that his delegation found the reasoning behind the Japanese proposal (A/CN.9/347, p. 38) to modify article 14 and article 16(5) quite convincing and thus supported it. The proposal that they be deleted was going too far.

35. The CHAIRMAN said that, if article 14 were deleted, the effect would be that a receiving bank executing a payment order erroneously was under an obligation to issue a new payment order for the difference.

36. Mr. FELSENFELD (United States of America) said that the topic was a complex one that should not be tackled with undue haste. If article 14 was removed, it was not clear that it would be incumbent upon the bank that had made the erroneous transfer to provide the outstanding funds. At very least, there should be a provision stating that the funds should be made available within the original time period.

37. The CHAIRMAN said that it might be better to postpone further discussion of article 14 until a later stage of the session, in view of the fact that any decision would have implications for article 16(5).

38. For the sake of consistency, however, he suggested that the words "the credit transfer is completed in accordance with article 17(1), but" should be deleted.

39. It was so decided.

40. The CHAIRMAN informed the Commission that agreement had been reached on article 10(6), following consultation with the representative of Germany, and suggested that the Commission proceed to consider article 15, which was also the subject of a proposal for deletion. If it were deleted, article 11(7) could also be eliminated as falling outside the scope of the Model Law.

Article 15

41. Mr. GREGORY (United Kingdom) said that the issues raised by articles 14 and 15 were different. Article 15 covered the situation in which the beneficiary received more money than he should have, whereas the situation envisaged in article 14 was one in which the transfer had not been completed because the amount transferred was insufficient. It would be better to retain article 15, which was consonant with other references in the Model Law to cut-off of the acceptance by the beneficiary's bank.

42. Ms. KOSKELO (Observer for Finland) said that article 15 was too narrow and should not cover solely the situation of overpayment. It should be extended to cover the case in which an erroneous execution by a bank had resulted in payment to the wrong person.

43. Mr. CRAWFORD (Canada) said that he agreed with the observer for Finland. Any proposal to delete article 15 must be carefully considered in the light of the provision in article 16(8).

44. Mr. BURMAN (United States of America) said that the fundamental issue was whether there could be partial completion, and that issue should be carefully considered in the context of article 17 and elsewhere. The deletion of any one article might have far-reaching implications for the text as a whole.

45. It might help if it were understood what the banking system could and could not do. If the originator owed the beneficiary a specific amount and sent that amount, but payment was received in a lesser amount, the Model Law stated that the beneficiary had received that lesser amount: the relationship between the originator and the beneficiary, who might decide to accept the lesser amount as full or partial payment of the obligation or to return that amount and retain the obligation, however, was of much wider scope and embraced the whole range of contractual obligations between originator and beneficiary.

46. The CHAIRMAN said that it was his understanding that, when a beneficiary's bank accepted the payment order, whether the amount was insufficient, correct, or an overpayment had been made, the credit transfer was regarded as complete: there was thus no question of partial completion. He suggested that article 15 should be retained in its existing form.

47. Mr. SCHNEIDER (Germany) said that the United Kingdom representative had drawn attention to the differences between articles 14 and 15. Article 15 raised important questions of principle in that a beneficiary might not be aware of an overpayment: for example, if there was an ongoing business relationship between the originator and the beneficiary, the latter might assume that there had been an advance payment for delivery of goods. The

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article should therefore include a provision stating that the beneficiary was obliged to repay only if he was aware of the overpayment and was thereby enriched without cause.

48. Mr. FELSENFELD (United States of America) said that the German representative had touched upon an extremely complex area of law. The issues of when an overpayment had occurred or not and when payment might be retained or not had no place in the Model Law. It would suffice to refer in article 15 to "remedies otherwise provided by law".

49. Mr. CRAWFORD (Canada) said that he was concerned at the differing treatment of articles 14 and 15. Deletion of the opening words of article 14 would give rise to the inference that an underpayment was not completion, an inference reinforced by the text of article 17(3). However, that inference was not in keeping with the principle accepted by the Commission and the Drafting Group should be asked to find a way of removing it.

50. Mr. GREGORY (United Kingdom) proposed, to deal with the point raised by the representative of Germany, that the wording of article 15 be amended to read "... it has such rights to recover from the beneficiary the difference between the amounts of the payment orders as may otherwise be provided by law" instead of "... as are otherwise provided by law".

51. The United Kingdom amendment was adopted.

52. Following an indicative show of hands, the CHAIRMAN said he noted that most members of the Commission were in favour of retaining the text of article 15 as amended. He took it, therefore, that the Commission wished to approve article 15, as amended.

53. It was so decided.

Article 11 (continued)

54. The CHAIRMAN invited the members of the Commission to consider article 11(7) and suggested that the United Kingdom amendment to article 15 should be applied to the last line of that paragraph, which would then read "... as may otherwise be provided by law".

55. It was so decided.

Article 12

56. The CHAIRMAN recalled that the United Kingdom Government had proposed (A/CN.9/347, p. 62) that the first line of article 12 be amended to read "Until the credit transfer is completed in accordance with article 17(1) ...", instead of "If the credit transfer is not completed in accordance with article 17(1)".

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57. The Government of Japan had proposed that the content of the cooperation should be further specified by including the words "in particular by offering and gathering necessary information such as the whereabouts of the funds" before the words "in completing the credit transfer" (A/CN.9/347, p. 37). It might be thought, however, that such action was already implicit in article 12.

58. The Government of Canada had proposed that article 12 be made a mandatory rule (A/CN.9/347, p. 12), but delegations were reluctant to make the article a heavy liability and, especially since article 7(2) was not mandatory, they might find the proposal hard to accept.

59. The Government of Canada had also proposed that the expression "the next receiving bank" in the third line of article 12 should be amended to read "its receiving bank" (A/CN.9/347, p. 11).

60. Mr. FUJISHITA (Japan) said that, in view of the Chairman's comment that the action requested by his Government under article 12 was already implicit, his delegation might be able to agree to the existing text if that understanding was confirmed.

61. Mr. FELSENFELD (United States of America) proposed that article 12 should be deleted. The text imposed on the banks an obligation of unknown scope. It was normal business practice for banks to assist in clearing up any imperfection in a credit transfer: the service they offered was part of the competitive process. However, the more a transfer cost a bank the more it would have to charge its customers. The obligation under article 12 was impossible to quantify or define and hence impossible to enforce.

62. Mr. LIM (Singapore) said he supported the Japanese proposal, but suggested that it be limited to assistance in the form of information. That might meet some of the United States concerns. In any case, with high-speed electronic systems, the gathering of information should not be a problem.

63. The CHAIRMAN pointed out that the Working Group had considered that the Model Law ought to refer to the kind of assistance mentioned in article 12, even if it was obvious. Moreover, no penalty was provided, since article 16(a) did not refer to a breach of article 12. That point might meet the concern of the United States representative.

64. Mr. DUCHEK (Observer for Austria) said that the provision was too vague and there was no sanction if the obligation was not fulfilled. He therefore supported the proposal that article 12 be deleted.

65. Mr. RENGER (Germany) said he thought that article 12 was essential and should be retained. Many intermediary banks were involved in transferring money and there were no contractual relations between an originator and the receiving banks further on in the chain. If the transfer was not completed, the originator still had to fulfil his obligation to the beneficiary and therefore needed the assistance of the banks involved, particularly in international transfers.

66. Following an indicative show of hands, the CHAIRMAN noted that there was a majority in favour of retaining article 12.

67. He asked whether the members of Commission agreed that the type of assistance proposed by the Government of Japan was implicit in the existing text.

68. Mr. FELSENFELD (United States of America) said that his delegation was unclear as to how such an understanding would be recorded. It would have to be made clear in some way or other that there would be no penalty for a breach of article 12.

The meeting rose at 5.15 p.m.